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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 524.

MARYLAND CASUALTY COMPANY
(A CORPORATION),
Petitioner,

vs.

MILLIE R. JONES,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF ON BEHALF OF MARYLAND CASUALTY COMPANY, PETITIONER.

WALTER L. CLARK,
Counsel for Petitioner,
Calvert Building,
Baltimore, Md.

JOHN RALPH WILSON,
San Francisco, Cal.,

W. G. BONTA,
San Francisco, Cal.,

ROSZEL C. THOMSEN,
Baltimore, Md.
Of Counsel.

Kling Bros., Inc., Printers, 900 N. Calvert St., Baltimore, Md.

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BRIEF ON BEHALF OF MARYLAND CASUALTY COMPANY, PETITIONER.

I.

The Opinions of the Courts Below.

The District Court filed no opinion in this case. The opinion in the United States Circuit Court of Appeals for the Ninth Circuit is reported in 27 Federal Reporter, 2d Series, p. 521 (R. pp. 354-355).

II.

Jurisdiction.

This Court granted the petition for writ of certiorari in this case on December 10th, 1928 (U. S. ; 73 L. Ed. 191). The grounds upon which the jurisdiction of this Court is invoked are set forth in the brief in support of the petition for writ of certiorari on pages 7 and 8 thereof, and, in the interest of brevity, are not repeated at this point.

III.

Statement of the Case.

This action was commenced by the filing of a complaint in the Superior Court of the State of California in and for the City and County of San Francisco, by Millie R. Jones, the respondent herein, as plaintiff, against the Maryland Casualty Company, the petitioner herein, and one Elizabeth A. Rodgers, as defendant (R. p. 2). It was removed to the District Court of the United States for the Northern District of California, Southern Division, on the ground of diversity of citizenship (R. p. 30).

Mrs. Jones will be hereinafter referred to as the "Plaintiff," and the Maryland Casualty Company will be hereinafter referred to as the "Casualty Company."

The action was brought upon a certain bond made by one Akers, as principal, with the defendant Casualty Company as surety, in the sum of $25,000. The bond is set forth in full in the answer of the Casualty Company to the Plaintiff's complaint (R. pp. 39-42). The bond is also set forth in the bill of exceptions (R. pp. 125-128). The Casualty Company in its answer denied that it was indebted to the Plaintiff in any amount.

The case was tried before the Court without a jury, pursuant to a written stipulation of the parties filed in the case (R. p. 48).

Evidence was duly taken before the District Court upon the issues raised by the pleadings, and upon the conclusion of the whole evidence taken in the case before the Court, the defendant Casualty Company moved the Court to grant a nonsuit against the plaintiff (R. pp. 239-242).

The motion was made upon specific grounds stating wherein the evidence failed to support a judgment in favor of the plaintiff, but the Court denied the motion and allowed an exception to its ruling thereon. All of these proceedings are contained in the bill of exceptions settled and allowed by the District Court (R. p. 242).

The same day (May 10, 1927) the Court ordered that judgment be entered in favor of the plaintiff, and that the case be referred to a referee to take and state an account and report the same to the Court in accordance with an interlocutory decree entered on the same day (R. pp. 50-54 and p. 242).

On June 16, 1927, the Referee presented his report to the Court, showing a liability to the Plaintiff upon the part both of Akers and of the defendant Casualty Company in the sum of $25,000, with interest (R. pp. 319-322).

Exceptions to the report were duly taken by the Casualty Company at the time of its presentation to the Court, and these exceptions are included in the bill of exceptions (R. pp. 323-324). The Court, however, overruled said exceptions.

The Casualty Company had theretofore requested that special findings be filed (R. p. 49) and on August 15, 1927, the Court filed its "Findings of Fact and Conclusions of Law" (R. pp. 54-72). On the same day and in the same paper judgment was ordered entered in favor of the Plaintiff against the defendant Casualty Company for $29,889.57 and costs (R. pp. 72, 73). Exceptions to said decision and judgment of the Court were taken by the Casualty Company (R. pp. 324-327).

A writ of error was sued out to the Circuit Court of Appeals for the Ninth Circuit. That Court refused to consider the case upon its merits, and affirmed the judgment of the District Court. 27 Fed. (2d) 521 (R. pp. 354-357).

The Court, speaking through Judge Rudkin, said in part:

"All the assignments of error are based upon the insufficiency of the testimony to support the special findings; but the special findings, as made, were not excepted to, and there was no request for other or different findings.

"Section 700 of the Revised Statutes (28 U. S. C. A., Sec. 875) provides that when an issue of fact in any civil cause in a circuit court is tried and determined by the Court without the intervention of a jury, according to section 649, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or appeal; and when the finding is special the review may extend to a determination of the sufficiency of the facts found to support the judgment.

"On such a record it is too well settled to admit of further controversy that this Court cannot consider the sufficiency of the testimony to support the special findings, but only the sufficiency of the special findings to support the judgment. Lewellyn vs. Electric Reduction Co., 275 U. S. 243, 48 S. Ct. 63, 72 L. Ed. . The plaintiff in error does not contend that the special findings are insufficient for that purpose, and the contrary is apparent from an inspection of the Record. Having reached this conclusion, no useful purpose would be served by setting forth the voluminous findings, either in detail or in substance."

27 Fed. (2d) 321, 322 (R. pp. 354-355).

A petition for rehearing of the case was denied by said Circuit Court of Appeals on October 1, 1928 (R. p. 357).

A petition for a writ of certiorari was filed in this Court, and this Court granted the petition, but ruled that "the consideration of the cause shall be limited to the question whether the Circuit Court of Appeals erred in failing to review the rulings of the District Court in the progress

of the trial, excepted to at the time, and duly presented by a bill of exceptions" (U. S. , 73 L. Ed. 191).

We respectfully submit that all the assignments of error were not "*based upon the insufficiency of the testimony to support the special findings,*" as stated by the Circuit Court of Appeals, but that the following assignments of error were *based upon rulings of the Court in the progress of the trial of the cause, excepted to at the time, and duly presented by a bill of exceptions,* to wit:

Assignment No. 1 (R. pp. 330-322): Based upon the refusal of the Court to grant a nonsuit on defendant's motion, for the specific grounds stated therein (R. pp. 239-242).

Assignments Nos. 11, 12 and 14 (R. pp. 334-335): Based upon the action of the Court in disallowing defendant's exceptions to the report of the Referee.

Assignments Nos. 17, 18, 19 and 20 (R. pp. 335-339): Based upon rulings of the Court on certain evidence offered during the course of the trial.

Assignment No. 16 (R. p. 335): Based upon the action of the Court in including interest in the judgment.

Assignment No. 16 (R. p. 335): Based upon the action of the Court in referring the cause to a Master and Referee for the purpose of taking further testimony.

It is, of course, admitted that there was no request for different findings. There was no opportunity to make such request, since the same paper which contained the Findings of Fact and Conclusions of Law directed that judgment be entered accordingly, and the judgment was entered the same day (R. pp. 72, 73).

We do, however, respectfully show to this Court that every proper exception required by statute or by the rulings of this Court was taken, to the end that the Circuit Court of Appeals could and would review the findings of the District Court and render its judgment upon the merits of the case, as shown by the evidence taken and heard by the District Court.

IV.

Specification of Errors.

(To be considered by this Court, pursuant to order granting writ of certiorari passed herein on December 10, 1928, U. S. , 73 L. Ed. 191.)

1. The Circuit Court of Appeals erred in failing to review the rulings of the District Court in the progress of the trial, excepted to at the time, and duly presented by a bill of exceptions.

V.

ARGUMENT.

The Circuit Court of Appeals Erred in Refusing to Consider the Case Upon Its Merits.

A.

The Controlling Statute and Cases in This Court.

Section 700 of the Revised Statutes (Feb. 13, 1925, C. 229, Sec. 1, 43 Stat. 936, 28 U. S. C. A. 875) provides:

> "When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to Section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The Circuit Court of Appeals refused to consider the case upon its merits, saying:

> "All the assignments of error are based upon the insufficiency of the testimony to support the special

findings; but the special findings, as made, were not excepted to and there was no request for other or different findings."

27 Fed. (2d) 521 (R. p. 354).

We have shown (see page 5 hereof) that all the assignments of error were not "based upon the insufficiency of the testimony to support the special findings," but that some of them were based upon "rulings of the Court in the progress of the trial of the case, excepted to at the time and duly presented by a bill of exceptions," as required by the above statute. These rulings should have been reviewed by the Circuit Court of Appeals.

In the case of *Fleishmann Construction Co. vs. United States*, 270 U. S. 349, this Court said at page 356, that in order to obtain a review by an appellate court of conclusions of law a party must do one of two things:

He "must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the Court and obtain a ruling on them."

In the case of *Lewellyn vs. Electric Reduction Co.*, 275 U. S. 243, cited by the Circuit Court of Appeals in its opinion, this Court, speaking through Mr. Justice Stone, said:

"A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of the facts specially found to support the judgment, *and to the rulings excepted to and presented by the bill of exceptions.* (Rev. Stat. Sec. 649, 700 U. S. C., title 28, Sec. 773, 875, Fleischman Constr. Co. vs. United States, 270 U. S. 349, 70 L. Ed. 624, 46 Sup. Ct. Rep. 284)." (Italics ours.)

B.

The Motion for Nonsuit.

The petitioner in this case did, as above shown, present the propositions of law to the Court by its motion for nonsuit (R. pp. 239-242), and it obtained a ruling upon those propositions and an exception to that ruling (R. p. 242).

It has always been the rule of this Court that when at the close of the evidence a motion for judgment is made by a defendant upon the ground that the evidence is not sufficient to support a judgment in favor of the plaintiff, then the question whether or not the evidence is sufficient to support such a judgment becomes a question of law and must be determined by the Court on appeal.

St. Louis vs. Western Union Tel. Co., 148 U. S. 92;

Martinton vs. Fairbanks, 112 U. S. 673;

Norris vs. Jackson, 9 Wall. 125.

See also—

Bank of Waterproof vs. F. & D. Co., 229 Fed. 478;

Griffin vs. Thompson, 10 Fed. (2d), 127.

In the *Griffin vs. Thompson* case the Circuit Court of Appeals for the Fifth Circuit said:

> "Error is also assigned to the refusal of the court to make special findings of fact and of law. This was within the discretion of the Court and not error, but, as a motion for judgment was made by the defendant, the whole case is properly before us on the facts and the law."
>
> *Griffin vs. Thompson*, 10 Fed. (2d), 127, 128.

Indeed, the Circuit Court of Appeals for the Ninth Circuit itself has held exactly the same thing and cited the case last above quoted to the same effect.

Sartoris vs. Utah Const. Co., 21 Fed. (2d), 1.

Everything done by or before the trial court is in the record. At the very beginning of the bill of exceptions, it is stated:

> "Thereupon the following proceedings, and no other material to the issues, were had" (R. p. 83).

If it be suggested to the Court that no proper motion for judgment was made by the petitioner in the Court below, the answer is that the motion for a nonsuit was in all essentials a motion for judgment in behalf of the defendant.

Section 581 of the Code of Civil Procedure of the State of California, sub-section 5, provides:

> "Sec. 581. *Dismissal of actions and entry of nonsuit.* An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * *
>
> "(5) By the Court, upon motion of the defendant, when upon trial the plaintiff fails to prove a sufficient case for the jury."

Under the California practice a motion for nonsuit may be made either at the conclusion of the plaintiff's case or at the conclusion of the evidence presented by both parties to an action; but no matter when it is made, if it is made upon the proper grounds, it must be considered both by the trial court and by the appellate court on appeal. The motion for nonsuit was properly made according to the practice in the State of California.

Bohn vs. Pac. El. Ry. Co., 5 Cal. App. 622, 623;
Henry vs. Lingsweiler, 81 Cal. App. 142, 153;
Estate of Baird, 198 Cal. 490, 506;
Estate of Morey, 147 Cal. 495, 507;
King vs. Hercules Powder Co., 39 Cal. App. 223, 224.

Exceptions to the subsequent findings of fact were not necessary to perfect the motion for nonsuit, and as we have shown, would have been useless in this case, since the same paper which contained the Findings of Fact and Conclusions of Law, directed that judgment be entered accordingly, and final judgment was entered the same day.

In the case at bar a trial by jury was waived by written stipulation, but it has been the unbroken rule of the Supreme Court of California that a motion for nonsuit made before the Court sitting without a jury has the same effect as if it were made before the Court sitting with a jury.

> "The rules as to nonsuit are the same, whether the trial is by the Court or by a jury."
>
> *Friese vs. Hibernia Savings, etc., Soc.*, 139 Cal. 392, 394;
>
> *Szopieray vs. West Berkeley, etc., Co.*, 194 Cal. 106, 109.

And it has been squarely held by this Court that where the statute of a state permits a peremptory nonsuit, a Federal Court in the state will follow such statutes when the occasion for a motion for such nonsuit arises.

Coughran vs. Bigelow, 164 U. S. 301, 308.

This case has very lately been cited by the Circuit Court of Appeals for the Third Circuit as the law concerning nonsuit in the Federal Courts, in the case of *Stapleton vs. Reading Company*, 26 Fed. (2d) 242, 243.

We, therefore, respectfully submit that the bill of exceptions in this case contains every proper exception necessary to enable the Circuit Court of Appeals to determine from the record whether there was any evidence to support a judgment for the plaintiff, or whether the motion for nonsuit should have been granted. This Court should certainly so hold in view of its language in the case of *Liberty Oil Co. vs. Condon National Bank*, 260 U. S. 235, at page 245, as follows:

> "Under Sec. 269 of the Judicial Code, as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181, appellate courts are enjoined to give judgment after an examination of the record without regard to technical errors, defects or exceptions, which do not affect the substantial rights of the parties."

C.

Other Rulings.

Other rulings of the Court in the progress of the trial, excepted to at the time and duly presented by the bill of exceptions, include

(a) Rulings on defendant's exceptions to the Referee's report (Assignments of Error Nos. 11, 12 and 14—R. pp. 334-335).

(b) Rulings on the evidence (Assignments Nos. 17, 18, 19 and 20—R. pp. 335-339).

(c) The ruling of the Court including interest in the judgment (Assignment No. 16—R. p. 335).

(d) The ruling of the Court in referring the case to the Referee (Assignment No. 21—R. pp. 339-340).

Under the statute and cases above cited, we respectfully submit that the Circuit Court of Appeals should have reviewed these rulings.

CONCLUSION.

We, therefore, submit that the case should be remanded to the Circuit Court of Appeals for further consideration and determination upon the merits.

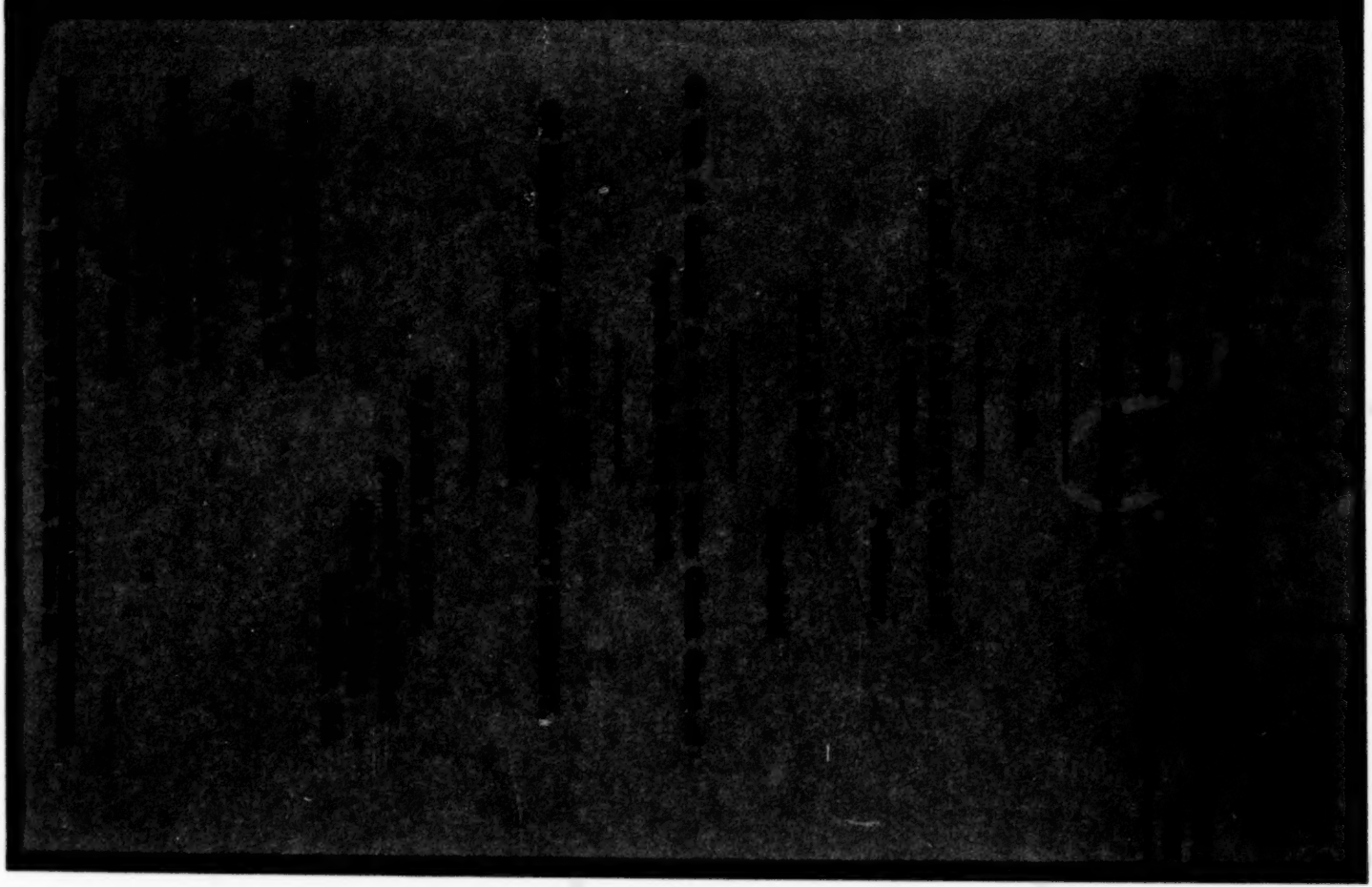
Respectfully submitted,

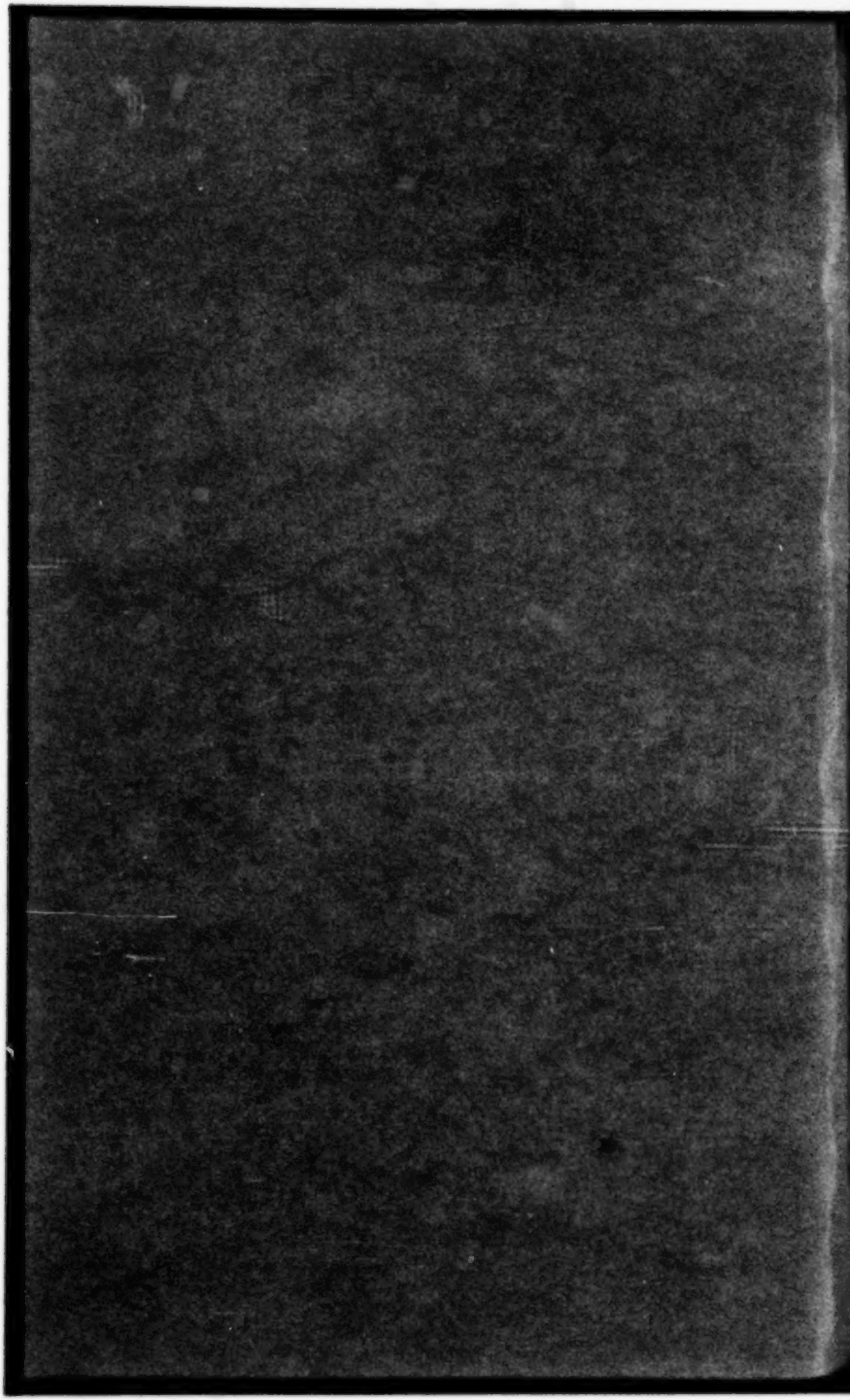
WALTER L. CLARK,
Counsel for Petitioner,
Calvert Building,
Baltimore, Md.

JOHN RALPH WILSON,
San Francisco, Cal.,

W. G. BONTA,
San Francisco, Cal.,

ROSZEL C. THOMSEN,
Baltimore, Md.
Of Counsel.





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REPLY BRIEF
ON BEHALF OF MARYLAND CASUALTY COMPANY, PETITIONER.

I.

Answering Section B of Respondent's Brief.

Section B of Respondent's Brief, beginning at page 3 thereof, raises a point which was not raised before the Circuit Court of Appeals, nor referred to by that Court in its opinion. She contends:

> "The Circuit Court of Appeals did not err in failing to review the rulings of the District Court in the

progress of the trial excepted to at the time and duly presented by bill of exceptions because of appellant's failure to specify in its brief the alleged errors relied upon, and further failure to set out separately and particularly each error asserted and intended to be urged."

The Circuit Court of Appeals, however, did not affirm the decision of the District Court because of any failure to properly specify the errors relied upon, nor because of any failure to set out separately and particularly each error asserted and intended to be urged. Speaking through Judge Rudkin, the Court said:

"All the assignments of error are based upon the insufficiency of the testimony to support the special findings; but the special findings, as made, were not excepted to, and there was no request for other or different findings.

"Section 700 of the Revised Statutes (28 U. S. C. A., Sec. 875) provides that when an issue of fact in any civil cause in a circuit court is tried and determined by the Court without the intervention of a jury, according to Section 649, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or appeal; and when the finding is special the review may extend to a determination of the sufficiency of the facts found to support the judgment.

"On such a record it is too well settled to admit of further controversy that this Court cannot consider the sufficiency of the testimony to support the special findings, but only the sufficiency of the special findings to support the judgment. Lewellyn vs. Electric Reduction Co., 275 U. S. 243, 48 S. Ct. 63, 72 L. Ed. The plaintiff in error does not contend that the special findings are insufficient for that purpose, and the contrary is apparent from an inspection of the Record. Having reached this conclusion, no useful purpose would be

served by setting forth the voluminous findings, either in detail or in substance."

27 Fed. (2d) 521, 522. (R. pp. 354-355.)

Our position is this:

The refusal of the District Court to grant our motion for nonsuit was excepted to at the time (R. p. 242), and duly presented by our bill of exceptions (R. pp. 82, 239-242).

The refusal of this motion was the first error assigned in the assignment of errors (R. p. 330).

It was not necessary—in fact it would have been an improper repetition—to again print the assignment of errors in full in our brief. Instead we did what Rule 24 of the Circuit Court of Appeals requires. We specified the errors relied on—we set out in full wherein the evidence failed to support any judgment for the plaintiff, and why, therefore, under the California practice, our motion for nonsuit should have been granted. It will be noted that the specifications of error in our brief, filed in the Circuit Court of Appeals, are substantially the same as the grounds upon which our motion for nonsuit had been based. (See page 5 of Brief on Behalf of Plaintiff in Error in the Circuit Court of Appeals, printed as an appendix to the Brief for Respondent herein, and page 330 of the Record in this case, where the assignment of errors is set out in full.)

See also—

McCullough vs. Satterthwait, 11 Fed. (2d) 111, 112;

Vider vs. O'Brien, 62 Fed. 326.

II.

Answering Section C of Respondent's Brief.

It seems evident upon principle that a motion for nonsuit, excepted to at the time, and duly presented by a bill of exceptions, is reviewable on appeal whether or not there have been special findings of fact. Yet the respondent herein seems to have fallen into error, not only as to the

principle involved, but also in her comment upon the cases cited by petitioner. In the case of *Bank of Waterproof vs. F. & D. Co.*, 299 Fed. 478, cited on page 8 of our brief, and on page 12 of the petition for certiorari, there were both a motion for non-suit, properly excepted to, and special findings of fact, not excepted to at all, just as in the present case.

We submit, therefore, that the refusal of the motion for non-suit was a ruling of the District Court in the progress of the trial, excepted to at the time, and duly presented by a bill of exceptions; that it was properly brought to the attention of the Circuit Court of Appeals; and that it should have been considered by that Court.

Respectfully submitted,

WALTER I. CLARK,

Counsel for Petitioner,
Calvert Building,
Baltimore, Md.

JOHN RALPH WILSON,
San Francisco, Cal.

W. G. BONTA,
San Francisco, Cal.

ROSZEL C. THOMSEN,
Baltimore, Md.
Of Counsel.